



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Conrac Corporation, SCD Division--Request  
for Reconsideration  
File: B-225646.2  
Date: August 21, 1987

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### DIGEST

Prior decision is affirmed on reconsideration where protester has not shown any error of fact or law which would warrant reversal of the decision. The protester's disagreement with the conclusion of this Office with respect to the materiality of exceptions taken by it to standard solicitation provisions does not provide a basis for reversal.

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### DECISION

Conrac Corporation, SCD Division requests reconsideration of our decision in Conrac Corporation, SCD Division, B-225646, May 11, 1987, 66 Comp. Gen. \_\_\_, 87-1 CPD ¶ 497. In that decision, we denied in part and dismissed in part Conrac's protest of the award of a contract to Hartman Systems under request for proposals (RFP) No. N00163-86-R-1109, issued by the Department of the Navy for color video monitors.

Conrac principally argued that the Navy improperly rejected its offer for failure to comply with the RFP data rights licensing requirement. Conrac had taken exception to the clause in its revised best and final offer (BAFO). We concluded that Conrac's protest constituted an objection to the RFP data rights clause and, as such, concerned an impropriety apparent from the RFP. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1987), Conrac was required to protest this matter no later than the extended June 26 closing date for receipt of initial proposals. See Cosmos Engineering, Inc., B-217430, Jan. 18, 1985, 85-1 CPD ¶ 62. Since it did not do so, we concluded its protest against the data rights provision was untimely. Further, we declined to invoke our "significant issue" exception to decide on the merits this untimely argument because we found that Conrac had taken exception to a number of standard terms and conditions of the RFP and was thus ineligible for award under the solicitation. We similarly declined to consider Conrac's argument that the awardee's proposal was technically deficient because Conrac was ineligible for award in any event.

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In its request for reconsideration, Conrac argues that our holding with regard to the exceptions taken by it to the standard terms and conditions of the solicitation was in error. Specifically, Conrac states that, while these terms and conditions were themselves "material," the exceptions taken by Conrac were minor in nature and cannot be used to declare Conrac ineligible for award. In light of this position, Conrac asserts that we are obliged to consider its other arguments regarding the proprietary data rights licensing clause and the technical conformity of the awardee's proposal. We affirm our original decision.

In our original decision we noted that Conrac had taken exception to, among other things, the solicitation's 90-day stop-work period (Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.212-13(a) (1986)) and risk of loss provision which specified that the risk of loss of or damage to supplies remained with the contractor until either acceptance by the government or delivery to the government, whichever was later (FAR, 48 C.F.R. § 52.246-16(b)(2)). We rejected Conrac's argument that these exceptions were minor in nature and properly the subject for negotiation and thus upheld the Navy's rejection of Conrac's proposal as unacceptable. Conrac Corp., SCD Division, B-225646, supra, 87-1 CPD ¶ 497 at 7.

As to the stop-work order provision, Conrac argues that the FAR provision which contains this clause states in its preamble that "[t]he '90 day' period stated in the clause may be reduced to less than 90 days." According to the protester, it was unobjectionable by virtue of this language for it to reduce the 90-day stop-work period to 30 days. We disagree. The language in the preamble to FAR, 48 C.F.R. § 52.212-13, vests in the contracting officer, not the offeror, the decision whether to reduce the 90 day period. Moreover, where an offeror proposes such a change in its BAFO, it cannot expect that the matter will thereafter become the subject of negotiations since an agency is not required to reopen negotiations in order to afford an offeror an opportunity to furnish requirements called for in the solicitation or request for BAFO's. Loral Electronics Systems, B-224540, Feb. 10, 1987, 87-1 CPD ¶ 143. Furthermore, we do not agree with Conrac's assertion that the change which it made in the stop-work provision is immaterial since it affects the rights of the government under the resulting contract; under Conrac's version of the clause, the contracting officer is limited to issuing an order to stop all, or any part of the work, for a period of 30 days, rather than 90 days. Also, the contracting officer is permitted only 30 days in which to decide whether to cancel the stop-work order or terminate the work covered by the order. See FAR, 48 C.F.R. § 52.212-13(a). Contrary to

Conrac's position, as indicated in our prior decision, we view Conrac's revision of the time periods to be a material deviation.

With respect to the risk of loss provision, the solicitation contained the risk of loss provision appearing at FAR, 48 C.F.R. § 52.246-16, which provides in clause (b)(2) that where a contract's delivery terms are F.O.B., destination, the risk of loss shall remain with the contractor until acceptance by the government or delivery of the goods, whichever shall occur later. By contrast, Conrac proposed in its revised BAFO that the risk of loss pass to the government at the time of delivery. According to the protester, this change was merely a "straight forward clarification of the provisions of the solicitation." Furthermore Conrac argues that, since the solicitation provided for delivery F.O.B. destination and provided for inspection and acceptance at the destination, its version of the clause is entirely consistent with the wording of the FAR risk of loss provision.

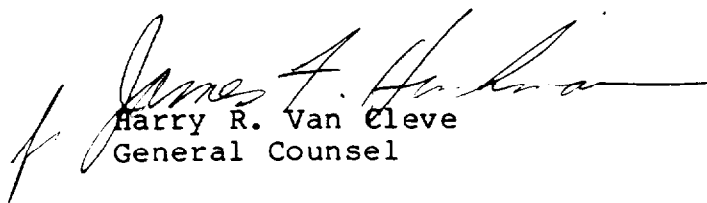
We do not agree. While it is true that Conrac's deviation from the clause does not alter the government's right to accept or reject the goods, it does shift the risk of loss to the government for the period of time after delivery but before acceptance. Moreover, the importance of this period of time during which the risk of loss is with the government is increased in this case since the solicitation expressly provides for inspection and acceptance at the destination. The imposition of this added liability upon the government is not in our opinion immaterial and, as noted above, Conrac could not have reasonably expected this term to be the subject of negotiation after the submission of revised BAFO's. Loral Electronics Systems, B-224540, supra.

Although Conrac also questions the analysis contained in our prior decision concerning its proposed warranty provision, we deem it unnecessary to consider the matter. The above discussion amply illustrates that, as to the two clauses considered, Conrac's proposal materially deviated from the standard provisions of the solicitation. The two provisions are only examples from a more lengthy list of exceptions contained in Conrac's revised BAFO. Accordingly, we again conclude that Conrac's proposal was properly rejected by the Navy.

As to the other two issues raised by Conrac, we again decline to reach a decision on the merits. Regarding the proprietary data rights licensing issue, since it was untimely raised, our consideration of it would necessarily require us to invoke the "significant issue" exception to our Bid Protest Regulation's timeliness requirements

4 C.F.R. § 21.2. As stated in our first decision we decline to invoke the exception since our decision upon the matter would be at best academic in light of Conrac's ineligibility for award. As to the allegation that Hartman's proposal was technically deficient we conclude (again, as we did in our first decision) that Conrac is not an "interested party" for purposes of questioning whether Hartman's proposal complied with the terms of the solicitation. 4 C.F.R. § 21.0, Engine & Generator Rebuilders, 65 Comp. Gen. 191 (1986) 86-1 CPD ¶ 27.

Our prior decision is affirmed.

  
Harry R. Van Cleve  
General Counsel